

The Administrative Law Judge made additional findings concerning: whether the delivery of newspapers was part of the regular trade or business of Hutchinson Publishing Company; whether claimant's injury was the result of an accident which arose out of and in the course of employment; whether notice was timely given; whether written claim was

timely made and whether claimant was a statutory employee of respondent Hutchinson Publishing Company. For the reasons stated below, those issues will not be reached.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds that the Order entered by the Administrative Law Judge should be affirmed.

This case was extensively and well briefed by the parties. It presents a close question with regard to the nature of the employment relationship between claimant and respondents. The Administrative Law Judge noted the essential elements for such a determination in his Order. The relevant facts and applicable law are set out therein and it is not necessary to repeat same. The findings and conclusions enumerated in the Order by the Administrative Law Judge are accurate. They are adopted by the Appeals Board as if fully set forth herein. The Appeals Board agrees that claimant has failed to sustain his burden of proving that an employee/employer relationship existed between himself and respondent Victor Ruelas (or Deborah Ruelas) and/or that he was the statutory employee of respondent Hutchinson Publishing Company.

The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative. See McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994); Falls v. Scott, 249 Kan. 54, 815 P.2d 1104 (1991); and Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

There is considerable discussion in the record and in the briefs of the parties concerning the extent to which respondents had a right to and/or exercised control over claimant's work. However, it appears that the right to control in this case was minimal. Instead, it was the finished product, specifically the timeliness of that product, i.e. the bulk delivery of newspapers, which was important. The method of delivery was insignificant except as it related to the timeliness of delivery. To the extent respondents had and/or exercised control over claimant's method of delivery, it was a product of the perishable nature of the merchandise. In the newspaper business, timeliness of delivery is of the essence. As claimant was involved in the delivery process, he was required to perform his work expeditiously. Thus, it was this end result which was significant. To that end, respondents recommended certain delivery routes and loaded claimant's truck in a manner consistent with the deliveries being made in conformity with that route. However, these routes were described as merely suggested methods of performance and claimant was free to deliver the newspapers in any manner he chose. Therefore, the Appeals Board agrees with the finding by the Administrative Law Judge that the level of control or the right of control necessary to establish an employment relationship is absent from this case.

In Professor Larson's treatise on workers compensation law, there appears the following example of control that is inadequate to create an employee status:

"For example, a lumber company's contract for the cutting of logs required that they be a certain length and that the trees be cut not more than a certain height from the ground. The company's general manager went through the woods about once a week, and if the logs were too short, he would direct that they be cut longer. Such directions were held to be no more than necessary to ensure the agreed end result, and not to make the loggers employees. The 'end result' detail may even be one of time or speed of work, if time is of the essence of the independent contract. Thus, when a contract required the cutting of a particular stand of timber within 180 days, this detail was treated as part of the result contracted for. And an ice company's request that a roofer complete the job promptly without interruption for beer did not amount to exercise of control, since other repairs had to wait until the roof job was finished. Similarly, if the control of a trucker goes no further than directions on where to pick up or put down the load, this is usually held to be only a part of the end result." 1B Larson, The Law of Workmen's Compensation, § 44.22 (1996).

In this case, there is the additional element of control whereby claimant was directed as to when the load should be picked up and by when delivery should be completed. However, given the nature of the product, the Appeals Board does not consider this to be materially different from the above situations.

There are additional factors which the Kansas appellate courts have recognized as material to a determination of the employment relationship. These include: whether payment was by the piece of work or by the hour; the furnishing of tools and equipment; the right to employ assistants and to supervise their activities; and whether the work was part of the regular business of the employer. In this case, claimant was paid a fixed daily rate for the completion of the deliveries. His pay was the same regardless of the amount of time it took him to complete his work. No taxes were withheld and claimant was furnished with a form 1099 at year's end. He received no fringe benefits, paid vacation, or sick leave. Claimant furnished his own vehicle and paid his own expenses, including gas, maintenance, and repairs. Claimant was free to hire substitutes without consulting respondents. Also, claimant was free to terminate his work relationship with respondents at any time. All of these factors suggest a contractor/subcontractor relationship between Mr. Ruelas and claimant.

Of those factors which have been considered material to a determination of the employment relationship, there is one which comes down in favor of the claimant. This has been described as whether the work claimant performed was a part of the regular business of the respondent. Delivering newspapers was a part of the business of Mr. Ruelas. Hutchinson Publishing Company disputes that newspaper hauling is a part of the business

of newspaper publishing. The Administrative Law Judge found otherwise and the Appeals Board agrees. Nevertheless, when considering all of the factors, the greater weight of the evidence reflects a relationship of independent contractor rather than employer and employee. Also, as claimant was a self-employed independent contractor, he does not fit the definition of statutory employee. See Allen v. Mills, 11 Kan. App. 2d 415, 724 P.2d 143 (1986). Therefore, having found claimant to be an independent contractor, he is not covered by the Workers Compensation Act and benefits cannot be awarded.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore dated April 8, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1997.

---

BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS  
D. Steven Marsh, Wichita, KS  
Thomas A. Dower, Hutchinson, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director